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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

**JOHNNY LEE PRYMER,**

*Petitioner,*

v.

**KEVIN OGDEN, SIMON SOLIS, and MARK HOLLIS,**

*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1.

WHETHER THE SEVENTH CIRCUIT ERRED IN UPHOLDING THE DISTRICT COURT'S FINDING THAT THE FORCE APPLIED BY THE OFFICERS IN ARRESTING PETITIONER WAS OBJECTIVELY REASONABLE.

2.

WHETHER THE SEVENTH CIRCUIT ERRED IN UPHOLDING THE DISTRICT COURT'S FINDING THAT THE OFFICER'S BLOW TO THE HANDCUFFED PETITIONER WAS OBJECTIVELY REASONABLE.

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*Constitutional Provisions and Statutes*

Amendment IV of the United States Constitution .. *passim*

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

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> Peace officer's use of force in making arrest.
>
> (a) A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. . . .
>
> (b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

725 ILCS 5/107-1 ..... 8-10

"a written order from a court directed to a peace officer, or to some other person specifically named, commanding him to arrest a person."

725 ILCS 5/107-2 ..... 8-10

a) He has a warrant commanding that such person be arrested; or

b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another Jurisdiction; or

c) He has reasonable grounds to believe the person is committing or has committed an offense.

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## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

*Prymer v. Ogden, et al.*, 29 F.3d 1208 (1994).

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit entered judgment on July 21, 1994. Jurisdiction in the federal courts is based upon 28 U.S.C., Section 1331; the original cause was brought pursuant to 42 U.S.C. Section 1983. Jurisdiction before the United States Supreme Court is based upon Supreme Court Rule 10(1)(a) and 10(1)(C)—*Jurisdiction on Writ of Certiorari.*

## CONSTITUTIONAL PROVISIONS AND STATUTES

IV Amendment—United States Constitution

XIV Amendment—United States Constitution

Illinois Revised Statutes, Chapter 38, par. 7-5

Relevant portion:

(a) A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. . .

(b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

## STATEMENT OF FACTS

On the night of January 9, 1991 Petitioner, Johnny Lee Prymer (hereinafter "Petitioner") overheard a police scanner report which indicated that his brother, Richard Prymer (hereinafter "Richard"), was being "staked out" by the Rockford Police Department. (R. 176). Petitioner drove to the scene to warn his brother and upon arriving, parked his car behind a squad car. (R. 178-179).

Petitioner then approached Respondent Officer Simon Solis (hereinafter "Solis"), and asked him if he had seen Richard Prymer. (R. 179). Respondent asked Petitioner his name and what he wanted. After Petitioner complied with

his request, he began walking away, calling out to his brother. (R. 180).

Petitioner then approached Respondent Officer Mark Hollis who was walking in his direction. (R. 184). Petitioner asked Hollis if he had seen Richard Prymer. Officer Hollis responded by asking Petitioner to identify himself; Petitioner complied and identified himself as Johnny Prymer. (R. 190). Hollis ran a warrant check on Petitioner. The dispatcher, Officer Peterson radioed back to Hollis that there was an outstanding warrant for Johnny Prymer. (R. 190).

Petitioner advised Hollis that there was in fact no warrant for his arrest, and started to walk back to get in his car. Hollis ordered him to stop, but he continued towards his car. (R. 190-191). Hollis ordered Petitioner out of the car. Petitioner refused. Hollis then reached into Petitioner's car and grabbed Petitioner by the left shoulder and yanked him out of the car. Respondent Ogden assisted Hollis in handcuffing Petitioner. The three men began to struggle and all three men went to the ground.

Solis arrived and assisted Hollis in handcuffing Petitioner's right hand. Ogden stood up, bent over Petitioner and kicked Petitioner in his left rib area. This was repeated a second time, harder. During this time, Solis was at Petitioner's leg area, kneeling down and putting weight on the back of Petitioner's legs and buttocks.

With both arms handcuffed, Petitioner was assisted to his feet and walked to the squad roll. Upon reaching the squad car, Petitioner made a noise in his throat, which the respondents characterized as "gurgling." Ogden hit Petitioner in the head.

Once Petitioner was placed in the squad roll, the dispatcher radioed that a mistake had been made and that

no warrant was outstanding for Petitioner. Petitioner heard this and stated "Wait until my lawyer hears about this." Petitioner requested to be taken to the hospital, but once there he refused treatment. He heard one of the officer's laughing with a hospital staff member, and he feared a conspiracy. Thus, he preferred to wait and see his own doctor the next day. He was taken to the Winnebago County Jail.

The next day he sought medical care at Veterans Hospital. Petitioner testified that his elbow was sore, his neck was stiff and his rib hurt. During trial, Dr. Kamlesh Ramchandani testified on his behalf. Dr. Ramchandani testified that based on Dr. Thompson's report, Petitioner complained of pain on the left side of his lower and lateral chest, some posterior neck pain, and some right elbow pain. Upon examination, Petitioner had some posterior neck tenderness and some mild right elbow tenderness over the radial head.

The basis of the District Court's jurisdiction is under 28 U.S.C., Section 1331; the case was brought pursuant to 42 U.S.C., Section 1983.

## ARGUMENT

### I.

### THE SEVENTH CIRCUIT ERRED IN UPHOLDING THE DISTRICT COURT'S FINDING THAT THE FORCE APPLIED BY THE OFFICERS IN ARRESTING PETITIONER WAS OBJECTIVELY REASONABLE.

In rendering its decision, the Seventh Circuit erred in upholding the District Court's finding that the force applied by the officers was objectively reasonable. The District Court erred in two regards: it misapplied the fourth

amendment's "objective reasonableness" standard as enunciated by this Court in *Graham v. Connor*, 490 U.S. 386 (1989) and it erroneously relied upon a clearly inapplicable Illinois Statute.

**1. The District Court erred as a matter of law in misapplying the standard articulated by the Supreme Court in *Graham v. Connor*.**

In *Graham v. Connor*, 490 U.S. 386 (1989), this court held that all claims that law enforcement officers have used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the fourth amendment and its "reasonableness" standard, rather than under a fourteenth amendment "substantive due process" approach. *Id.* at 395.

The Court expressly ruled that the fourth amendment provides the explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct and that the fourth amendment, not the "more generalized notion" of "substantive due process" must be the guide for analyzing those claims. *Id.* at 395.

Clearly, the court has designated the fourth amendment as the exclusive source of constitutional protection against excessive force during an arrest by peace officers. The *Graham* Court articulated a standard by which such claims must be analyzed. In determining what is reasonable, each case must be examined as to the facts and circumstances surrounding the arrest including:

- the severity of the crime at issue;
- whether the suspect poses an immediate threat to the safety of the officers or others and;
- whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 395.

However, the District Court clearly misapplied two out of three of these factors in rendering its decision. The Court did not properly weigh the severity of the crime at issue. It is significant, yet not noted by the court, that the Petitioner was committing no crime at the time the defendant officers began to arrest him. Instead, the court took into account the fact that Petitioner was convicted of aggravated battery (a conviction which stemmed from the unlawful arrest itself). Clearly, the crime of resisting an unlawful arrest is less severe than many other crimes. However, the District Court gave great weight to the aggravated battery charge in determining the reasonableness of the Respondents' actions. Instead, the resisting arrest/aggravated battery charge should have been taken into account as the third factor under *Graham*, not as the underlying crime itself. In this case, it is significant that there was no underlying crime warranting an arrest of the Petitioner.

The court also did not properly take into account the second factor enunciated by the *Graham* court. Under the *Graham* analysis, a court must weigh whether the suspect poses an immediate threat to the safety of the officers or others. In this case, the Petitioner was unarmed and was not threatening the police officers or others with harm. He was merely protesting his arrest and maintaining his innocence. However, the District Court noted that the arrest took place at night in the area of a known drug house. Furthermore, the court noted that Petitioner was "loud and belligerent and crying out for help. Respondent Solis testified that many of the onlookers were wearing long coats and had their hands in their pockets. Such was cause for concern for the officers' safety. . . ."

In taking into account these external factors, the court misapplied the *Graham* doctrine. According to *Graham*,

the court is to determine whether the suspect poses a threat, not whether other people pose a threat. Here, the court determined that the "onlookers in long coats with hands in their pockets" posed a threat to the officers' safety. There is no indication that the court determined that the suspect himself was physically dangerous or posed an immediate threat to the safety of the police officers. Instead, the district court pointed to other external factors in rendering its decision. Thus, the District Court misapplied the second prong of the *Graham* analysis and the Seventh Circuit erred in affirming this decision based on faulty analysis.

**2. The District Court erred as a matter of law by misapplying Illinois Revised Statutes, Chapter 38, paragraph 7-5, upon which it erroneously relied in rendering its judgment.**

The District Court erred as a matter of law by misapplying the Illinois statute governing a peace officer's use of force in making an arrest. On page 15 [App. 30] of its written opinion, the District Court took judicial notice of Illinois Revised Statutes, Chapter 38, par. 7-5, which provides as follows:

> Peace officer's use of force in making arrest.
>
> (a) A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest.
> . . .
>
> (b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any

> force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

In taking judicial notice of this provision, and particularly subsection (b), the court clearly relied on this Illinois Statute in rendering its decision. However, the statute is not applicable to the facts of the instant case. Subsection (b) provides that a peace officer is justified in using force pursuant to an invalid warrant. However, in the instant case, there was no warrant.

Under Illinois law, a "warrant of arrest" is "a written order from a court directed to a peace officer, or to some other person specifically named, commanding him to arrest a person." 725 ILCS 5/107-1. In the instant case, the defendants arrested Petitioner pursuant to a mistaken transmission by the dispatcher, Officer Peterson. The police did not have a warrant as defined by 725 ILCS 5/107-2.

Under Illinois law, an arrest by a Peace Officer can be effectuated in three circumstances:

a) He has a warrant commanding that such person be arrested; or

b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another Jurisdiction; or

c) He has reasonable grounds to believe the person is committing or has committed an offense. 725 ILCS 5/107-2.

Clearly, Illinois law provides that a warrantless arrest is justified if it is based upon a reasonable belief that a warrant for the person's arrest has been issued. Thus, the initial arrest of Mr. Prymer, while based on improper information, was proper under Illinois law. However, it

is important to note that Illinois law does not provide for the use of force in situations involving a warrantless arrest.

The statute governing the peace officer's use of force in effectuating an arrest clearly restricts such force to those situations where a warrant has been issued. The Respondent Officers in the instant case didn't have an invalid warrant, as required in subsection (b); that is they didn't have a written direct order from a court—they didn't have a warrant!

The committee comments of 720 ILCS 5/7-4 demonstrate the intent of the legislature to restrict the use of force to those situations in which a warrant or invalid warrant has been issued. The committee notes state:

> "Subsection (b) relates to the extent of protection which a peace officer or person summoned by him has when he uses force to effect an arrest which actually is unlawful. The protection accorded to the peace officer is restricted to the situation in which, without his knowledge the warrant under which the arrest is made has been issued illegally. Because of his professional status, he logically may be held to a rather strict standard in determining the lawfulness of his conduct in interfering with the freedom of citizens; but he hardly can be required to conduct an inquiry into the legality of the issuance of each warrant delivered to him for execution."

The committee notes further indicate that the circumstances under which subsection (b) are to be applied are restricted to those cases in which a warrant has been issued invalidly on the part of the magistrate or court:

> (The Texas provision concerning justifiable harm during arrest under an order (warrant) includes the statement: "The officer is justified through there may have been an error of judgment on the part of the

> magistrate or court, if the order emanated from the proper authority." Illinois Legislative Committee Comments to 720 ILCS 5/7-5, 1961, Revised by Charles H. Bowman (citing Vernon's Ann. P.C. Art. 1211.)

In Mr. Prymer's case, no warrant was delivered to any of the defendant officers for execution. No warrant had been issued illegally. No warrant had been issued at all. Clearly, the District Court erred in applying the law of the State of Illinois. By taking judicial notice of this provision and relying on it in its opinion, the District Court erred as a matter of law. Thus, the Supreme Court should reverse the decision of the District Court as affirmed by the Seventh Circuit Court of Appeals.

## II.

## THE SEVENTH CIRCUIT ERRED IN UPHOLDING THE DISTRICT COURT'S FINDING THAT THE OFFICER'S BLOW TO THE HANDCUFFED PETITIONER WAS OBJECTIVELY REASONABLE.

The District Court erred as a matter of law in applying the due process analysis as set forth in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert denied*, 414 U.S. 1033 (1973). While the Supreme Court has held that the fourth amendment is the standard which should be used in analyzing excessive force claims, several circuits are still requiring the Petitioner to prove elements which existed under the traditional due process analysis. Some circuits, including the Seventh Circuit, are still requiring that a plaintiff prove that he/she has suffered a "severe injury".. This requirement originated in the due process inquiry formulated in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.).

The *Glick* court held that use of force which "shocks the conscience" violates the fourteenth amendment. The following four factors were enunciated as the test to apply in analyzing such claims:

1) the need for the application of force
2) the relationship between the need and the amount of force that was used;
3) the extent of the injury inflicted and;
4) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Glick*, 481 F.2d at 1033.

However, this four-part due process analysis was rejected by this Court in *Graham v. Connor*, *(infra)*, and replaced by the fourth amendment's "objective reasonableness test." However, in the instant case, the District Court failed to properly apply the "objective reasonableness test" to the blow to Petitioner's head and instead opted to apply the obsolete *Glick* test.

Indeed, acting under the guise of the *Graham* standard, the District Court held that Respondent Ogden's blow to Petitioner's head was rational under the objectively reasonable standard. However, on page 16 of its written opinion, the district court notes that "Petitioner was not injured by Respondent Ogden's action. In fact, Petitioner never was said to be bleeding or noticeably injured at all during the night in question."

The fourth amendment guarantees "the right of the people of the people to be secure in their persons . . . against unreasonable searches and seizures." In a proper application of the fourth amendment standard, the severity of the Petitioner's injury should not be taken into account. However, the District Court expressly relied on this impermissible factor in rendering its decision. The court specifically noted that the Petitioner was not injured; that he wasn't bleeding. A fourth amendment inquiry should not involve the severity of Petitioner's injury. Kicking a

suspect in the ribs and punching him in the face constitute constitutional violations. The mere fact that the suspect's ribs aren't broken or his face is not bleeding profusely do not render the officers' actions constitutional. However, the District Court expressly relied on the fact that the Petitioner was not injured, in rendering its decision.

Although the fourth amendment test does not call for a "severe injury" requirement, some circuits have continued holding on to this last vestige of the *Glick* test. For example in *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (en banc), the Fifth Circuit held that a plaintiff must prove a "significant injury" in order to state a claim under *Graham*. *Id.* at 480. *Morel* involved an arrestee who suffered permanent scars on his wrists and was unable to work for two weeks as a result of the officer's actions. *Id.* at 478. In remanding the case, the Fifth Circuit noted that factual issues existed as to whether the plaintiff's injuries were "significant". Furthermore, the *Morel* court noted, that neither "minor harm" nor "transient distress" would be sufficient. *Id.* at 480.

Likewise, in upholding the District Court's decision in the case at bar, the Seventh Circuit also approves this hybrid *Glick-Graham* standard. On page 14 of its opinion, the Seventh Circuit states, "in this case we agree with the district court that it was reasonable for the an officer not to want to be spat upon. Furthermore, we cannot say that Officer Ogden's reaction to Mr. Prymer's attempt to spit on him was objectively unreasonable in the context of this case."

There appears to be some confusion among the circuits in regards to what analysis to apply under the *Graham* decision. The Seventh Circuit appears to be following the same path as the Fifth Circuit by adopting this "fourth

amendment standard with a twist." The Seventh and Fifth Circuits are still holding on to the vestiges of the due process analysis by imposing a requirement of "severe injury" to excessive force claims. Thus, the Supreme Court should grant certiorari to resolve this issue. The Supreme Court should hold that the fourth amendment's "objective reasonableness" inquiry does not call for "severe injury" as an additional requirement.

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully petitions this court to grant certiorari and prays that this Honorable Court reverse the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT

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No. 93-1529

JOHNNY LEE PRYMER,

*Plaintiff-Appellant,*

*v.*

KEVIN OGDEN, SIMON SOLIS,
and MARK HOLLIS,

*Defendants-Appellees.*

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Appeal from the United States District Court for the
Northern District of Illinois, Western Division.
No. 91-C-20053—**P. Michael Mahoney**, *Magistrate Judge.*

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ARGUED APRIL 8, 1994—DECIDED JULY 21, 1994

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Before CUMMINGS and RIPPLE, *Circuit Judges*, and TINDER, *District Judge.**

RIPPLE, *Circuit Judge.* Johnny Lee Prymer brought this action under 42 U.S.C. § 1983 in which he alleged that the defendants, Officers Kevin Ogden, Simon Solis, and Mark Hollis, violated his Fourth Amendment rights when they used excessive force to arrest him. A bench trial was held and judgment entered in favor of the defendants. Mr. Prymer now appeals. For the reasons that follow, we affirm.

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* The Honorable John Tinder, of the United States District Court for the Southern District of Indiana, is sitting by designation.

# I

# BACKGROUND

## A. *Facts*

On January 9, 1991, Johnny Lee Prymer heard over his police scanner that members of the Rockford Police Department were watching for a suspect named Richard Prymer, Mr. Prymer's brother, outside a known drug house. Mr. Prymer hurried to the scene to warn his brother that the police were watching him and that he should not come out of the house with drugs. Mr. Prymer arrived at the scene within six or seven minutes of the first radio transmission. Mr. Prymer pulled up behind a police car and got out. He then walked up to Officer Solis and asked whether the officer had seen Richard Prymer. Officer Solis asked Mr. Prymer to identify himself and to explain why he was inquiring about Richard Prymer. Whether Mr. Prymer complied with the officer's request is disputed. Mr. Prymer continued to walk down the street and to call for his brother. When Officer Solis called him back to the car, Mr. Prymer responded, "If you want me, come and get me." Officer Solis then asked Mr. Prymer to leave the area so that he would not interfere with surveillance. Mr. Prymer got into his car and pulled away.

As he was leaving, Mr. Prymer observed two other officers running after a suspect. Mr. Prymer turned a corner, got out of his car, and briefly spoke with Jeffrey Sims, who was sitting in a parked car nearby. Mr. Prymer then approached Officer Hollis who was walking in Mr. Prymer's direction. The parties dispute the events that followed.

The officers testified, and the district court found, that Officer Hollis asked Mr. Prymer to identify himself. Mr. Prymer did not answer; instead, Mr. Prymer kept walking toward Officer Hollis yelling, "Do you want to f-- with me?". Officer Hollis then radioed to headquarters to see if there were any outstanding warrants for Johnny Prymer.[1]

---

[1] Apparently, Officer Hollis recognized Mr. Prymer from an earlier encounter.

The radio dispatcher confirmed that there was. Mr. Prymer turned to walk toward his car. Officer Hollis instructed Mr. Prymer to stop. Mr. Prymer did not comply, but continued to walk toward his car. Officer Hollis then radioed for assistance and grabbed the door of Mr. Prymer's car to prevent him from shutting it. Officer Hollis ordered Mr. Prymer out of the car. Mr. Prymer refused and said, "F-- you, I don't have to get out of the car." Officer Hollis repeated his request and Mr. Prymer repeated his answer. Officer Hollis then reached into the car, grabbed Mr. Prymer by his left shoulder, and pulled him out of the car. The officer informed Mr. Prymer that there was an outstanding warrant for his arrest; Mr. Prymer denied this accusation. Officer Hollis then attempted unsuccessfully to handcuff Mr. Prymer.

Officer Ogden, who had heard yelling, came to assist Officer Hollis. Officer Ogden grabbed Mr. Prymer's left arm, but Mr. Prymer broke loose and struck Officer Ogden. Because Officer Ogden was wearing a bullet-proof vest, he could not tell whether the blow was a push or a closed-fist punch. Officer Ogden once again tried to take Mr. Prymer's left arm to get the handcuffs on him. Mr. Prymer struggled and eventually all three men were on the ground. Mr. Prymer was on his stomach and kept his hands beneath him to prevent them from being handcuffed. Mr. Prymer also was yelling and kicking.

Officer Solis then arrived to assist the other two officers in getting the cuffs on Mr. Prymer's right hand. After several attempts to get Mr. Prymer's arms from beneath him, Officer Ogden bent over Mr. Prymer, pulled on Mr. Prymer's arm, and gave him a quick jab kick in the ribs. When Mr. Prymer did not release his arm, the officer repeated the kick. During this time, Officer Solis was kneeling down and putting weight on the back of Mr. Prymer's legs.

After the officers handcuffed Mr. Prymer, he walked under his own power to the police transport vehicle. Before he was placed in the vehicle, Mr. Prymer made a

gurgling noise in his throat as if he were going to spit on Officer Ogden. Officer Ogden struck Mr. Prymer in the forehead with a straight-arm stun technique to redirect Mr. Prymer's head. Mr. Prymer was then placed in the transport vehicle. After Mr. Prymer was in the vehicle, the police dispatcher radioed that he had made a mistake; there was no outstanding warrant for Mr. Prymer.

Mr. Prymer tells a very different story. Mr. Prymer claims that when Officer Hollis initially ordered him out of the car, Mr. Prymer advised Officer Hollis that there was not a warrant for his arrest. Mr. Prymer then got into his car to leave. After Officer Hollis removed him from the car, Mr. Prymer protested that he had done nothing wrong. In response to these protestations, Mr. Prymer states, the officers began to hit him. Mr. Prymer claims that he attempted to put his arms out for the officers to handcuff him; however, instead of handcuffing him, one officer put Mr. Prymer in a chokehold while the other officers continued to beat him. The officers, continues Mr. Prymer, then ordered him to the ground and one officer proceeded to kick him several times while another officer held his legs.

According to Mr. Prymer, after this beating, he walked to the police van under his own power. While at the van, the radio dispatcher informed the officers that there had been a mistake; there was no warrant for Johnny Prymer. Mr. Prymer then claims that he stated, "Wait until my lawyer hears about this." In response to this remark, Officer Ogden hit Mr. Prymer in the forehead with a clenched fist. Mr. Prymer alleges that the officers then discussed the need to charge Mr. Prymer with "something."

Before the officers took Mr. Prymer to headquarters, they conveyed him to the hospital. Mr. Prymer, however, refused treatment. He later claimed that this refusal was because one of the officers was laughing with a hospital security guard and Mr. Prymer was suspicious of their

intentions. Mr. Prymer was taken to the Winnebago County Jail; he was released on bond the following day.

Mr. Prymer was charged and convicted of battery upon a police officer. After the conclusion of his criminal trial, Mr. Prymer brought this suit under § 1983 in which he alleged that the defendant officers violated his Fourth Amendment rights. Although Mr. Prymer also had alleged violations of due process in his original and first amended complaints, he did not include these claims in his second amended complaint.

B. *District Court Proceedings*

At the time of trial on this action, Mr Prymer's criminal appeal had not yet been decided. Nevertheless, during the trial of this civil action, the court gave collateral estoppel effect to the conclusion of the state criminal trial court that Mr. Prymer had struck Officer Ogden in the chest. Counsel for Mr. Prymer objected on the grounds that the state criminal court's determination was irrelevant and prejudicial. The court overruled the objection. However, it noted that this recognition had, in its view, a minimum relevance to the overall litigation: "I would point out [that the information upon which the criminal conviction was based] doesn't say how, what type or under what circumstances, nor does it necessarily dispose of Mr. Prymer's case as far as excessive force and arrest is concerned." Tr. 600.

Among the witnesses testifying on behalf of Mr. Prymer was Dr. Kamlesh Ramchandi. Dr. Ramchandi testified that "[Mr. Prymer] possibly had severe contusion [to his ribs] which subsequently healed." Tr. 415. Furthermore, the doctor testified that, with regard to any injury to Mr. Prymer's neck, his own exam and review of a previous doctor's records "did not reveal any loss of range of motion or any objective findings to suggest that he had a fracture of his neck. So my impression was that he had a cervical sprain which could have been due to any trauma." Tr. 416.

After the conclusion of the trial, the court issued an order containing findings of fact and conclusions of law that largely accepted the officers' version of the facts. In the court's view, Mr. Prymer's claims were brought under the Fourth Amendment and therefore a Fourth Amendment standard should be used to determine whether the officers had violated Mr. Prymer's constitutional rights.

> In *Graham v. Connor*, ____ U.S. ____, 109 S. Ct. 1865 (1989), the Court held that the proper standard used in deciding what Constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop or other "seizure" of the person is the Fourth Amendment's "objective reasonableness" standard.

Mem. Order at 12. After stating the standard, the district court found that the

> amount of force used to effectuate Plaintiff's arrest was reasonable under the circumstances present in this cause of action. The court notes that the arrest took place at night in the area of a known drug house. Approximately five to ten people were standing outside of the drug house watching the events unfold. Plaintiff was loud and belligerent and crying out for help. Defendant Solis testified that many of the onlookers were wearing long coats and had their hands in their pockets. Such was cause for concern for the officers' safety.
>
> Plaintiff was also actively resisting his arrest. Most notable in showing this is the fact that Plaintiff was found guilty in State court of aggravated battery in violation of Illinois Revised Statutes, chapter 38, paragraph 12-4(b)(6) (1991). This court is bound through the doctrine of collateral estoppel by that finding. Furthermore, if Plaintiff had cooperated in being handcuffed, the entire incident would have been over in a matter of minutes as the radio dispatcher would have been able to contact Defendants regard-

> ing the mistaken warrant information. The court notes that Plaintiff was not hit or kicked once Defendants had him under control and in handcuffs.
>
> Finally, Plaintiff posed a risk of flight as his car was close at hand. . . . Accordingly, the court finds, using the objectively reasonable standard, that Defendants were justified in exercising the amount of force used to realize Plaintiff's arrest.

*Id.* at 14-15.

Finally, the court addressed Officer Ogden's "blow" to Mr. Prymer's head. The court found that this "was also rational under the objectively reasonable standard." *Id.* at 15. The court found that Mr. Prymer was preparing to spit on Officer Ogden and that the open-hand stun technique was a reasonable response to prevent Mr. Prymer's actions. This was especially true because Mr. Prymer was not injured from the officer's actions. *Id.* at 15-16.

Mr. Prymer appeals the judgment of the district court.

## II

## DISCUSSION

### A. *Collateral Estoppel*

#### 1.

Mr. Prymer first argues that the district court erred when it gave collateral estoppel effect to the state criminal trial court's finding that Mr. Prymer struck Officer Ogden. Specifically, Mr. Prymer argues that, because his conviction was on appeal at the time of the civil trial, it was not a final decision for the purposes of collateral estoppel.

Collateral estoppel will prevent the relitigation of an issue only when four prerequisites are met. First, the party against whom collateral estoppel is asserted must have been fully represented in the prior litigation. Second, the precluded issue must be identical to the issue involved in the prior litigation. Third, the issue must have been

actually litigated and decided on the merits. Finally, the resolution of the issue must have been necessary to the court's judgment. *Gray v. Lacke*, 885 F.2d 399, 406 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990). With regard to the third prerequisite, the party against whom the prior decision is invoked must have had a " 'full and fair opportunity to litigate' that issue in the prior case." *Id.* Mr. Prymer submits that, because he had filed a timely notice of appeal in his criminal case and because the appeal was pending at the time the court gave preclusive effect to the criminal court conviction, the district court was barred from using collateral estoppel.[2]

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[2] As Mr. Prymer asserts in his brief, our decision in *Gray* does contain the broad statement that a full and fair opportunity to litigate involves the right to appeal an adverse decision. 885 F.2d at 406. We believe, however, that this case must be read in the context of the procedural posture presented to the court in that case. The court was presented with a situation in which the party had not prevailed in the district court, and the district court had addressed her equal protection and First Amendment contentions. On appeal, this court had resolved the case without addressing those issues. In *Gray*, we held that those issues were not precluded by the doctrine of collateral estoppel in the later litigation because appellate review of those issues had been precluded by the court's decision in the earlier appeal to decide the matter without addressing them. In reaching that decision, this court relied upon those cases that hold that nonfinal interlocutory orders do not have collateral estoppel effect. Although one other case from our circuit has stated, in passing, a view of finality similar to that in *Gray*, *see Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1124 (7th Cir. 1987) ("[S]ince the appeal from the Detroit decision is pending, that decision is not final for purposes of allowing a defense of res judicata to be sustained in the present suit."), it is clear that the court has adhered to the general rule in American jurisprudence that a final judgment of a court of first instance can be given collateral estoppel effect even while an appeal is pending. *See Williams v. C.I.R.*, 1 F.3d 502, 504 (7th. Cir. 1993) ("What is sure is that a judgment final in the trial court may have collateral estoppel effect even though the loser has not exhausted his appellate remedies."). This has been the approach of our circuit for many years. *See Kurek v. Pleasure Driveway & Park*

(Footnote continued on following page)

In evaluating Mr. Prymer's submission, we encounter a serious threshold problem: he never presented the objection to the district court. When the district court admitted the findings of the criminal trial court, counsel for Mr. Prymer objected on the grounds that the evidence was irrelevant and that the probative value was outweighed by the prejudice to Mr. Prymer. Tr. 599. Counsel never objected on the ground that the elements of collateral estoppel were not met. The Federal Rules of Evidence require a litigant to make a timely and specific ob-

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[2] *continued*
*Dist., Etc.*, 557 F.2d 580, 595 (7th Cir. 1977) (stating that pendency of an appeal does not suspend the operation of a final judgment for collateral estoppel purposes), *vacated on other grounds*, 435 U.S. 992 (1978).

In this case, the mandate of 18 U.S.C. § 1738 (requiring federal courts to give full faith and credit to the judgments of state courts) controls the analysis, and we are required to give the final criminal judgment of the trial court of Illinois the same effect as it would have in a subsequent Illinois proceeding while it was on appeal. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984). There is authority in Illinois that is compatible with the general rule that the final judgment of a trial court may be given collateral estoppel effect while on appeal. *See Illinois Founders Ins. Co. v. Guidish*, 618 N.E.2d 436, 440 (Ill. App. 1993) ("[A] final judgment can serve as the basis to apply the doctrines of res judicata and collateral estoppel even though the judgment is being appealed."). There is, however, authority to the contrary from the Supreme Court of Illinois which appears to place this position in question. *See Ballweg v. City of Springfield*, 499 N.E.2d 1373 (Ill. 1986) ("For purposes of applying the doctrine of collateral estoppel, finality requires that the potential for appellate review must have been exhausted."). None of these cases were criminal cases.

The parties before us do not contest that the district court erred in giving effect to the criminal court judgment. We are without the benefit of comprehensive briefing on this matter from the parties and resolution of the matter is not essential to our decision. We therefore need not decide definitively the content of Illinois law.

jection when evidence is admitted. Fed. R. Evid. 103.[3] " '[A] specific objection made on the wrong grounds and overruled precludes a party from raising a specific objection on other, tenable grounds on appeal.' " *Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1405 (7th Cir. 1991) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103[02], at 103-25 to -26 (1990)), *cert. denied*, 112 S. Ct. 2306 (1992); *see also United States v. Field*, 875 F.2d 130, 134 (7th Cir. 1989) ("Neither a general objection to the evidence nor a specific objection on other grounds will preserve the issue on review."). Because Mr. Prymer's counsel failed to object to the evidence on the ground he now sets forth, this argument has been waived.

Mr. Prymer contends that, even if he waived his argument, we still can recognize it under the doctrine of plain error. This argument is equally unavailing. This court has held that plain error generally is not cognizable in a civil case. *See Maul v. Constan*, 928 F.2d 784, 787 (7th Cir. 1991) ("[T]his court has decided that the plain error doctrine does not apply to civil cases unless the error concerns subject matter jurisdiction."). When an evidentiary ruling is the source of error, however, there is a very narrow exception to the general rule. We have stated:

> [T]he plain error doctrine may be available to review evidentiary rulings to which no objection was made at trial if a moving party can demonstrate (1) that exceptional circumstances exist, (2) that substantial rights are affected, and (3) that a miscarriage of justice will result if the doctrine is not applied.

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[3] Federal Rule of Evidence 103 reads in pertinent part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; . . .

*Deppe v. Trippe*, 863 F.2d 1356, 1362 (7th Cir. 1988). Mr. Prymer has made no effort to show this court how his case falls within this narrow exception.[4] He simply states that the "fairness" of the instant proceedings is affected because under Illinois law "collateral estoppel effect will be given to a judgment only when the potential for appellate review has been exhausted." Reply Br. at 2. Mr. Prymer does nothing more than restate a legal standard. Such a conclusory assertion cannot take the place of analysis. This court will not expend its own resources to make Mr. Prymer's arguments for him. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.) ("A party urging us to reverse a district court's judgment has an obligation to argue why we should reverse that judgment, and to cite appropriate authority to support that argument."), *cert. denied*, 112 S. Ct. 141 (1991). Therefore, Mr. Prymer has waived any argument based on plain error.

2.

However, even if Mr. Prymer had raised this objection at trial or properly had pursued his plain error argument on appeal, we would have to conclude that the district court's use of collateral estoppel is harmless error. The district court relied upon many factors to determine whether the officers' use of force was objectively reasonable: the arrest at night, near a known drug house; the number of suspicious onlookers who might heed Mr. Prymer's calls for help; the risk of flight posed by Mr. Prymer; and, finally, Mr. Prymer's active resistance of arrest. With regard to the last factor, the district court stated that "most notable in showing this is the fact that Plaintiff was found guilty in State court of aggravated battery. . . ." Mem. Order at 14. However, the state criminal

[4] In fact, Mr. Prymer does not even cite this court's standard for recognizing plain error in a civil case; he instead gives the standard applied by the Eighth Circuit. *See United States v. Whitted*, 994 F.2d 444 (8th Cir.), *vacated on reh'g on other grounds*, 11 F.3d 782 (8th Cir. 1993).

trial court's conclusion was not the only evidence considered for this factor. The district court stated:

> Furthermore, if Plaintiff had cooperated in being handcuffed, the entire incident would have been over in a matter of minutes as the radio dispatcher would have been able to contact Defendants regarding the mistaken warrant information. The court notes that Plaintiff was not hit or kicked once Defendants had him under control and in handcuffs.

*Id.* at 15. The state criminal court conviction therefore only helped to establish one factor of the many that the court considered in determining that the force was reasonable. Because the state criminal court conviction played such a minor role in the magistrate judge's analysis, we believe any error is harmless.

B. *Fourth or Fourteenth Amendment Analysis*

Mr. Prymer next argues that the district court employed the wrong analysis in determining whether his constitutional rights were violated by the actions of the officers.[5] Mr. Prymer contends that, when Officer Ogden struck him with the open-hand stun technique, he was already in custody. Consequently, the district court should have used the due process standard, applicable to pretrial detainees, instead of the Fourth Amendment standard, applicable to arrest situations.

As he had with his collateral estoppel argument, Mr. Prymer failed to make this argument to the district court. Mr. Prymer's second amended complaint alleged only violations of his Fourth Amendment rights and not his due

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[5] Although Mr. Prymer challenged the legality of the arrest itself in his second amended complaint, he does not raise this challenge on appeal. Mr. Prymer also never argues to this court, or below, that his resistance to an unlawful arrest was justified. Instead, Mr. Prymer rests his claim for relief on the officers' actions in the face of his complete cooperation.

process rights.[6] Indeed, at oral argument, counsel for Mr. Prymer admitted that the Fourth Amendment theory was the only theory of relief presented in the complaint, in Mr. Prymer's proposed findings of fact, or in the arguments made to the district court after the conclusion of evidence. Because Mr. Prymer did not raise this theory of relief in the district court, we shall not recognize it now on appeal. *See Ohio Casualty Ins. Co. v. Rynearson*, 507 F.2d 573, 582 (7th Cir. 1974) ("The principle that new issues or new bases of liability may not be raised for the first time on appeal is too well known to require citation.").[7]

C. *Sufficiency of the Evidence*

Finally, Mr. Prymer claims that the evidence was not sufficient to support the district court's conclusion that the officers actions were objectively reasonable. This argument takes two forms: an attack on the district court's factual findings and an attack on the legal conclusions drawn from those findings. First, Mr. Prymer contends that the factual findings of the district court are clearly erroneous. He submits that the court disregarded Dr. Ramchandi's testimony that Mr. Prymer possibly had suffered injury and concluded to the contrary that in fact he had suffered no injury. However, the district court was entitled to take Dr. Ramchandi's opinion for what it was

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[6] Mr. Prymer previously had alleged violations of due process in his original and first amended complaints. These claims were dropped in the second amended complaint, in all likelihood in response to the defendants' motion to dismiss these claims. However, Mr. Prymer cannot rely on the original complaints to further this argument because " '[i]t is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect.' " *Manning v. Ashland Oil Co.*, 721 F.2d 192, 197 (7th Cir. 1983) (quoting *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)).

[7] Mr. Prymer does not urge us to recognize this claim under the plain error doctrine, and any such argument would be unavailing.

worth—an equivocal opinion by a physician who had viewed the most pertinent information secondhand. Furthermore, the district court also was entitled to consider other relevant facts—e.g., that Mr. Prymer both walked under his own power to the police vehicle and refused medical treatment after the events of that evening. The same is true of the court's other factual findings. "[T]he district judge . . . evaluates the credibility of witnesses. He or she is in a unique position to do so and we will not disturb his or her determination unless it is without foundation." *United States v. Yanez*, 985 F.2d 371, 374 (7th Cir. 1993). We, therefore, cannot say that the district court's decision to adopt the version of the events supplied by the officers was clearly erroneous.

Second, Mr. Prymer attacks the district court's legal conclusion that Officer Ogden's actions were objectively reasonable. He cites *Meyer v. Robinson*, 992 F.2d 734 (7th Cir. 1993), for the proposition that an officer may not take any measure necessary to prevent being spat upon. In *Meyer*, an officer had wrapped gauze around a suspect's mouth to prevent being spat upon. We determined that, in that case, there was an issue of fact surrounding the incident that could not be resolved on summary judgment, namely, whether injury actually had resulted from the officer's actions. We did not resolve the issue of whether the actions were objectively reasonable. Consequently, *Meyer* is of little assistance to Mr. Prymer. In this case, we agree with the district court that it was reasonable for an officer not to want to be spat upon. Furthermore, we cannot say that Officer Ogden's reaction to Mr. Prymer's attempt to spit on him was objectively unreasonable in the context of this case.

## Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 21, 1994

BEFORE:

Honorable Walter J. Cummings, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable John D. Tinder, District Judge*

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No. 93-1529

JOHNNY LEE PRYMER,

Plaintiff-Appellant

v.

KEVIN OGDEN, SIMON SOLIS and MARK HOLLIS,

Defendants-Appellees

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Appeal from the United States District Court for the
Northern District of Illinois, Western Division
No. 91 C 20053, P. Michael Mahoney, Magistrate Judge

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The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

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* The Honorable John D. Tinder, of the United States District Court for the Southern District of Indiana, is sitting by designation.

[Dated February 10, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

No. 91 C 20053

JOHNNY LEE PRYMER,

Plaintiff,

v.

KEVIN OGDEN, SIMON SOLIS and MARK HOLLIS,

Defendants.

## ORDER

Plaintiff filed suit in the United States District Court for the Northern District of Illinois, Western Division alleging a deprivation of his Constitutional rights under 42 U.S.C. § 1983. Jurisdiction of this court is based upon 28 U.S.C. § 1343. A three day bench trial was held in this matter before Magistrate Judge P. Michael Mahoney commencing December 7, 1992. The following findings of fact and conclusions of law are a result of that trial.

## FINDINGS OF FACT

In the late evening to early morning hours of January 8th and 9th of 1991, a bizarre sequence of events occurred in the area of Andrews and Hinkley Streets in Rockford, Illinois. Police officer Bruce Brannum was patrolling this area in his squad car. While Officer Brannum

was driving East on Andrews Street from Hinkley Street, he saw a person sitting in the driver's seat of a parked car in front of 334 Andrews. This residence is commonly known as being a "drug house". As Officer Brannum drove past the vehicle, the person seated in the driver's seat slid over into the passenger seat. Such conduct raised Officer Brannum's suspicions and, as a result, he ran a license check on the vehicle using his car radio.

Police officer Peterson was working extra duty that night at the police communications center. Officer Peterson overheard the vehicle registration check come in and also heard the report that the vehicle was registered to a Richard Prymer who had an outstanding warrant. When Officer Brannum heard from the radio dispatcher regarding the outstanding warrant, he parked his squad car on Hinkley Street, just South of Andrews Street, and radioed for help. Officer Brannum saw no other pedestrians in the area at that time.

Defendant Solis, a Rockford police officer since 1989, was the first officer to come to Officer Brannum's assistance. Defendant Solis parked his vehicle on Forest Street, just South of Andrews Street, in a Northbound direction. Officer Brannum continued to observe the vehicle through his binoculars from his squad car parked on Hinkley.

Shortly thereafter, Defendants Hollis and Ogden, also Rockford police officers, arrived driving a squad roll.[1] Defendants drove into an alley that runs North and South and is located just west of the 334 Andrews house. The squad roll parked in the alley facing South. Defendants Hollis and Ogden testified that they observed the occu-

[1] A squad roll is a police van used to transport prisoners.

pant of the vehicle under investigation exit the vehicle and walk Westbound on Andrews. Officer Brannum also testified that the individual whom he had seen in the car exited the car, stood outside the car and then began walking West on Andrews toward Hinkley. Defendant Hollis recognized this individual to be Jeffrey Simms.[2] A warrant was run on Mr. Simms, but no warrants were outstanding.[3] Defendant Ogden testified that Mr. Simms walked across the alley in front of the squad roll and proceeded South down the alley.

In the meantime, Plaintiff, Johnny Prymer, was listening to his police scanner at his girlfriend's house. While he took off his shirt and shoes Plaintiff heard the report that Richard Prymer's car was parked on Andrews Street and that Richard Prymer had an outstanding warrant for his arrest. Richard Prymer is Plaintiff's brother. Plaintiff quickly left his girlfriend's house, putting on house slippers and a coat, and went to the area being patrolled. Plaintiff testified that he was going to warn his brother that the police were looking for him on a warrant. Plain-

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[2] Defendant Hollis had arrested Mr. Simms on two to three previous occasions.

[3] At trial, Jeffrey Simms testified that on the evening in question he had been riding around with Jerry Bailey since 8:00 or 8:30 p.m. Mr. Simms was driving the car and the car had license plates registered to Richard Prymer. He parked the car on Andrews Street and waited while Mr. Bailey went into the house at 334 Andrews to collect some money. While Mr. Bailey was in the house, Mr. Simms noticed the police car patrolling the area. Mr. Simms then slid from the driver's side to the passenger side of the car because he did not have a driver's license. During his deposition, Mr. Simms testified that he was standing along side his car watching the events of the evening unfold. At trial, however, Mr. Simms testified that he remained in the car the entire time, exiting the car only after everything was over.

tiff parked his vehicle initially behind Defendant Solis' squad car on Forest Street.

Plaintiff approached Defendant Solis, who remained in his squad car. Plaintiff asked Defendant Solis where Richard Prymer was. Defendant Solis observed that Plaintiff did not have a shirt on and was wearing house slippers. Defendant asked Plaintiff his name and what Plaintiff wanted. Plaintiff did not respond. As Plaintiff began walking Northbound toward the intersection of Andrews and Forest, Defendant Solis asked him to come back to the squad car because Defendant did not want Plaintiff to interfere with the surveillance. Plaintiff responded by saying, "If you want me, come get me." Defendant Solis again asked Plaintiff to leave the area. Plaintiff then walked back toward Defendant Solis stating "What'd you say, what'd you say?"

While this event was taking place between Defendant Solis and Plaintiff, an individual exited the 334 Andrews house and approached the passenger door of the vehicle under investigation. Officer Brannum approached the individual and asked him for identification in order to determine if the person was Richard Prymer. The individual did not respond, but instead fled Southbound behind the 334 Andrews house. Officer Brannum began to chase the individual; however, Defendant Ogden took over the chase and Officer Brannum returned to his squad car. Defendant Solis also joined in the pursuit.

The individual turned from his Southbound direction and ran Northeast. According to Defendant Ogden, the individual slowed down or stopped on the Northeast corner of Forest and Andrews. The individual, later identified as Jerry Bailey, was handcuffed in 10 to 15 seconds without a struggle. Defendant Solis then "patted down" Mr.

Bailey. Officer Brannum, who had driven his squad car around the block in an effort to aid in the pursuit of Mr. Bailey, drove up and parked his squad car on the Northeast corner of Andrews and Forest. Mr. Bailey was placed in Officer Brannum's squad car.

Meanwhile, Plaintiff had returned to his vehicle and turned Westbound onto Andrews. Defendant Hollis was walking West on Andrews toward Defendants Ogden and Solis when Plaintiff drove past Defendant Hollis and parked his car. Plaintiff exited his vehicle.[4] Plaintiff then walked toward Defendant Hollis, unzipped his coat, made a gesture with his fist striking his chest and said "Do you want to fuck with me?" Plaintiff repeated this statement twice. As Plaintiff continued to approach, Defendant Hollis told Plaintiff to move away.[5]

Defendant Hollis ran a warrant check on Plaintiff. The check was performed on "Control 3".[6] The dispatcher, Officer Peterson, radioed back to Defendant Hollis that there was an outstanding warrant for Johnny Prymer.[7] Officer

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[4] Plaintiff testified at trial that at this time he walked to the car in which Jeffrey Simms sat and asked Mr. Simms if he had seen Richard Prymer.

[5] Defendant Hollis testified that he had previously known Plaintiff. Defendant Hollis had problems with Plaintiff in the past and had known Plaintiff to be verbally abusive. Defendant Hollis had seen Plaintiff in the Winnebago County Jail, as a prisoner, between five to ten times.

[6] Rockford has a total of eight controls.

[7] Officer Peterson testified that ordinarily warrant checks are done on Control 5. Officer Peterson assumed, however, that in this situation Defendant Hollis could not go to the proper channel for the warrant check. Defendant Hollis then testified that he ran the warrant check on Channel 3 because he did not have time to switch to Channel 5 as Plaintiff was walking away toward his car.

Peterson testified that he had overheard the initial registration check on the vehicle that came back registered to Richard Prymer who had an outstanding warrant on him. Officer Peterson also testified that he knew a surveillance was taking place on Prymer. Approximately one minute elapsed, however, between the time Officer Peterson told Defendant Hollis that there was an outstanding warrant out on Johnny Prymer and the time he realized that the warrant was actually for Richard Prymer. Officer Peterson then tried, unsuccessfully, to contact Defendant Hollis to tell him a mistake had been made.

When Plaintiff heard the dispatcher state that there was an outstanding warrant out on him, Plaintiff turned and walked toward his car. Defendant Hollis ordered Plaintiff to stop, but Plaintiff continued to his car and attempted to get in. Defendant Hollis radioed for an officer to assist him and then grabbed the door of Plaintiff's car in an effort to prevent the door from being closed. Defendant Hollis ordered Plaintiff out of the car. Plaintiff refused and said "Fuck you, I don't have to get out of the car." Defendant Hollis repeated his request and Plaintiff repeated his answer. Defendant Hollis then reached in Plaintiff's car and grabbed Plaintiff by the left shoulder and pulled him out of the car. Defendant Hollis told Plaintiff he had a warrant outstanding and Plaintiff responded that he did not. Defendant Hollis then attempted to handcuff Plaintiff, but Plaintiff refused to cooperate.

Defendant Ogden, who could hear yelling, came to assist Defendant Hollis. Defendant Ogden described Plaintiff as being "loud and agitated". As Defendant Ogden grabbed Plaintiff's left arm, Plaintiff broke loose, turned and struck Defendant Ogden in the chest with his right hand, mov-

ing Defendant Ogden back.[8] Defendant Ogden had on a vest with a steel shock plate. Defendant Ogden then grabbed Plaintiff's left arm, again attempting to get it behind Plaintiff's back. Plaintiff continued the struggle.

During the struggle, Defendant Ogden attempted to take Plaintiff to the ground in an effort to gain control. All three men went to the ground. Plaintiff laid on his stomach, facing West, but kept his arms underneath him to avoid being handcuffed. Plaintiff was also kicking, twisting, screaming and yelling at this time.

Defendant Solis arrived and assisted Defendant Hollis in getting a handcuff on Plaintiff's right hand. Defendants Hollis, Solis and Ogden all noticed approximately 5-10 people from the 334 Andrews house come out and watch the happenings. This fact caused Defendants concern as Plaintiff was calling for help, although no one interfered or stepped into the street. Defendant Ogden testified that his objective was to end the struggle as soon as he could.

While Plaintiff was on the ground, Defendant Ogden was still trying to get Plaintiff's left arm out from underneath him. Defendant Ogden pulled on Plaintiff's arm with both hands while kneeling on one knee. Defendant Ogden stood up, bent over Plaintiff, pulled on Plaintiff's arm and

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[8] The court notes that Plaintiff received a State court felony conviction for aggravated battery to a police officer in relation to this blow.

The court further notes that there was some testimony during the trial that Plaintiff hit Defendant Ogden with his right fist. However, during cross examination, Defendant Ogden stated that he testified at the preliminary hearing on Plaintiff's State charge that it wasn't a fist but was more of a palm hit with a pushing action. Defendant Ogden weighed 220 pounds at the time of the incident.

then kicked Plaintiff in his left rib area. The kick consisted of a quick, jab kick.[9] This was repeated a second time, a little harder, and Plaintiff's left arm came out from under his body and was handcuffed behind Plaintiff's back.[10] During this time, Defendant Solis was at Plaintiff's leg area, kneeling down and putting weight on the back of Plaintiff's legs and butt.

With both arms handcuffed, Plaintiff was assisted to his feet and walked to the squad roll. Defendants Hollis and Ogden walked on either side of Plaintiff and Defendant Solis followed behind. Plaintiff did not require any assistance while walking to the squad roll. Plaintiff did state, however, "Why are you doing this to me?" Upon reaching the squad roll, Plaintiff was searched for weapons. Plaintiff then made a gurgling sound in his throat as if he were collecting saliva in his mouth in order to spit. Defendant Ogden hit Plaintiff with a straight arm, open hand blow between Plaintiff's eyebrow and hair line in order to "redirect" Plaintiff's head. Defendant Solis testified that he heard Plaintiff scream and that Plaintiff "started to get violent again".

Plaintiff was placed in the squad roll. At this time, the dispatcher radioed that a mistake had been made and that no warrant was outstanding on Johnny Prymer. The mes-

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[9] Defendant Ogden testified that he was wearing standard police shoes that he wore all year around with soft rubber soles at the time of the incident. The shoes had no cleats and he was not wearing any boots over the shoes.

[10] The kicks were described at trial as being a "stunning technique". Such a technique is used to distract an aggressive person when one is trying to get that person to do something. The technique was said to be an effective method to divert attention, but was not designed to inflict injury.

sage came over the portable radio of all three officers. Plaintiff heard this and stated "Wait until my lawyer hears about this."

While in the squad roll, Plaintiff requested to be taken to the hospital. Plaintiff testified that he had a "sting" in his chest and elbow, although Plaintiff was not bleeding and did not appear to the defendants to be injured. Defendants took Plaintiff to the Rockford Memorial Hospital Emergency Room.[11] At the emergency room, however, Plaintiff refused to allow the nurse and the doctor to examine him or treat him because he believed that the security officer and Defendant Ogden were laughing at him and that the doctor and nurse might conspire with the police officers. Plaintiff preferred to wait and see his own doctor the next day.

Plaintiff was then taken to the Winnebago County Jail. At the jail, Plaintiff testified that he asked that his handcuffs be removed as they had been on for three to four hours. Plaintiff stated that he needed relief but his request was refused. Defendant Solis, however, testified that he attempted to loosen the handcuffs, but Plaintiff would not let him. Plaintiff was described as being "abusive, belligerent and loud". Plaintiff was bonded out by his mother around 3:30 a.m.

The next day, Plaintiff was seen by Dr. Thompson at the Veterans Hospital. Plaintiff had made this appointment prior to this incident. Plaintiff testified that his elbow was sore, his neck was stiff and his rib hurt.

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[11] Testimony at trial revealed that it is standard procedure to take an arrestee to the hospital after a fight has occurred.

During trial, Dr. Kamlesh Ramchandani testified on Plaintiff's behalf. Dr. Ramchandani stated that, based on Dr. Thompson's report of January 9, 1991, Plaintiff complained of pain on the left side of his lower and lateral chest, some posterior neck pain, which was his major complaint, and some right elbow pain. Upon examination, Plaintiff had some posterior neck tenderness and some mild right elbow tenderness over the radial head. No effusion was noted, however, and Plaintiff had adequate range of motion. Some chest wall tenderness of the left lower anterior chest wall was also noted. An X ray of Plaintiff's chest, cervical spine and left elbow was performed that showed no fracture of his rib or left elbow.[12]

## CONCLUSIONS OF LAW

A plaintiff in a Section 1983 cause of action must allege facts that establish a deprivation of rights secured by the Constitution or laws of the United States. The United States Supreme Court has outlined the nature of a substantive due process claim under 42 U.S.C. § 1983 in the police brutality context. In *Rochin v. California*, 342 U.S. 165 (1952), the Court held that an individual's substantive due process rights are violated when the government engages in actions that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.* at 169. The *Rochin* Court did not, however, articulate specific standards for identifying what constitutes a substantive due process violation. Rather, the Court stated that a violation lies where

[12] The court wonders why Plaintiff's left elbow was x rayed when he complained of pain in his right elbow.

government conduct "shocks the conscience" or constitutes force that is "brutal" and offends "even hardened sensibilities." *Id.* at 172-73.

The court finds that there are three issues present in this cause of action. First is the erroneous report by the dispatcher that there was an outstanding warrant issued on Plaintiff and Plaintiff's subsequent arrest on this warrant. Second is the manner in which Defendants arrested Plaintiff and the kicks involved in getting Plaintiff handcuffed. Third is the blow to Plaintiff's head by Defendant Ogden while standing near the squad roll.

The court finds that the mistake by the dispatcher in communicating with Defendants regarding the warrant information on Plaintiff was, at most, negligent behavior on the part of the dispatcher. This negligence, in turn, does not impute to Defendants and does not rise to the level of a Constitutional violation. In *Daniels v. Williams*, 474 U.S. 327 (1986), the United States Supreme Court held that the Due Process Clause is not implicated by a negligent act of an official that causes unintended loss of or injury to life, liberty or property. *Id.* at 328. The *Daniels* Court specifically overruled its previous holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), to the extent that *Parratt* held that mere lack of due care by a State official may "deprive" an individual of life, liberty or property under the Fourteenth Amendment. *Id.* at 330-31.

The Supreme Court in *Daniels* noted that the lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. "To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." *Id.* at 332. That principle holds that due process guarantees apply to *deliberate* decisions of government officials to de-

prive a person of life, liberty or property. *Id.* at 331. Accordingly, the court holds that Defendants are not liable for the arrest of Plaintiff based upon the information provided by the dispatcher as to an outstanding warrant on Plaintiff. The court further notes that no testimony was presented that showed that Defendants knew at the time of the incident in question that the warrant check on Plaintiff was inaccurate.

The next issue faced by the court is the type and amount of force used by Defendants to effectuate the arrest of Plaintiff, that is, to get Plaintiff handcuffed and over to the squad roll. Following *Rochin, supra,* the United States Supreme Court developed a more definite standard for identifying substantive due process violations. In *Graham v. Connor,* ____ U.S. ____, 109 S. Ct. 1865 (1989), the Court held that the proper standard used in deciding what Constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop or other "seizure" of the person is the Fourth Amendment's "objective reasonableness" standard. *Id.* 109 S. Ct. at 1867, 1871. The Court reasoned that in determining:

> [W]hether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake.

*Id.* 109 S. Ct. at 1871 (citations omitted).

The *Graham* Court explained that it has long been recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat to effectuate the arrest or stop. *Id.* In determining what is "reasonable" each

case must be examined as to the facts and circumstances surrounding the arrest or stop including:

> the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

*Id.* 109 S. Ct. at 1872 (citation omitted). Furthermore, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

*Id.*

The court finds that the amount of force used to effectuate Plaintiff's arrest was reasonable under the circumstances present in this cause of action. The court notes that the arrest took place at night in the area of a known drug house. Approximately five to ten people were standing outside of the drug house watching the events unfold. Plaintiff was loud and belligerent and crying out for help. Defendant Solis testified that many of the onlookers were wearing long coats and had their hands in their pockets. Such was cause for concern for the officers' safety.

Plaintiff was also actively resisting his arrest. Most notable in showing this is the fact that Plaintiff was found guilty in State court of aggravated battery in violation of Illinois Revised Statutes, chapter 38, paragraph 12-4(b)(6) (1991). This court is bound through the doctrine of collateral estoppel by that finding. Furthermore, if Plaintiff

had cooperated in being handcuffed, the entire incident would have been over in a matter of minutes as the radio dispatcher would have been able to contact Defendants regarding the mistaken warrant information. The court notes that Plaintiff was not hit or kicked once Defendants had him under control and in handcuffs.

Finally, Plaintiff posed a risk of flight as his car was close at hand. Indeed, Plaintiff went to his car in an attempt to leave when he heard the warrant check come back stating there was an outstanding warrant on Plaintiff.[13] Accordingly, the court finds, using the objectively reasonable standard, that Defendants were justified in exercising the amount of force used to realize Plaintiff's arrest.

The last issue presented by the facts in this case is Defendant Ogden's "blow" to Plaintiff's head by the squad roll. The court finds that Defendant Ogden's impact with Plaintiff's head was also rational under the objectively reasonable standard. Both Defendants Hollis and Ogden testified that they heard a gurgling sound in Plaintiff's throat as if he were collecting saliva in an attempt to spit at

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[13] The court takes judicial notice of Illinois Revised Statutes, chapter 38, paragraph 7-5 which provides as follows:

> Peace officer's use of force in making arrest.
> (a) A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. . . .
>
> (b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would he justified in using if the warrant were valid, unless he knows that the warrant is invalid.

Defendant Ogden. The court finds it logical that a police officer would not want to be spat upon. Furthermore, Defendant Ogden used an open hand "stunning technique" to redirect Plaintiff's head. Plaintiff was not injured by Defendant Ogden's action. In fact, Plaintiff never was said to be bleeding or noticeably injured at all during the night in question. Plaintiff even refused to permit an examination of his alleged injuries at Rockford Memorial Hospital. The court, therefore, finds that this action likewise did not violate any of Plaintiff's Constitutional rights.

## CONCLUSION

For the reasons set forth herein, the court finds Defendant Ogden, Defendant Hollis and Defendant Solis not guilty of violating any of Plaintiff's Constitutionally protected rights on the night of January 8, 1991.

ENTER:

/s/ P. MICHAEL MAHONEY
P. Michael Mahoney, Magistrate Judge
United States District Court

DATE: 2/10/93